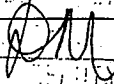


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NO. 32402-4

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COURT OF APPEALS

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROY LEN NEFF, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 02-1-05356-6

SUPPLEMENTAL BRIEF

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court treat Supplemental Finding of Fact No. 2 as a verity when it is supported by substantial evidence?
2. Do the trial court's supplemental findings show that this court should affirm the trial court as it properly upheld the warrant using the independent source doctrine?

B. STATEMENT OF THE CASE.

The court is referred to the state's initial response brief for a statement of the case.

C. ARGUMENT.

1. THIS COURT SHOULD TREAT SUPPLEMENTAL FINDING OF FACT 2 AS A VERITY ON APPEAL AS DEFENDANT HAS MADE NO ATTEMPT TO SUPPORT HIS ASSIGNMENT OF ERROR CHALLENGING CERTAIN FINDINGS WITH CITATIONS TO THE RECORDS, AUTHORITY OR ARGUMENT; MOREOVER IT IS SUPPORT BY SUBSTANTIAL EVIDENCE.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal.

State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to

challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. Id. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. Hill, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In Henderson Homes, Inc v. City of Bothell, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; *see also* State v. Jacobson, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

In applying the above law to the case now on appeal, the court should treat the findings of fact as verities. Defendant has assigned error

to Supplemental Finding of Fact 2. Appellant's Supplemental Brief at p.1. There is no argument in the brief, however, as to how these findings are unsupported by the evidence. There is only argument that the court should not have assessed the evidence in a different manner and reached a different conclusion. See Appellant's Supplemental Brief at pp.15 -22. Because the defendant has failed to support his assignment of error to the trial court's findings of fact with argument, citations to the record, and citations to authority, this court should treat the assignments as being without legal consequence. All the findings should be considered as verities upon appeal.

The challenged supplemental finding is supported by substantial evidence. The Supplemental Finding of Fact 2 states:

The court further finds that the responding deputies would have sought and would have been granted a search warrant without evidence obtained from the initial search of the garage. Prior to said entry, Deputy Jones, a member of the meth lab team with experience in over 100 meth labs, had noticed an "extremely powerful" smell of anhydrous ammonia which he knew was used to manufacture methamphetamine. Jones was informed by Mr. Neff that the residence had previously been a meth lab. Jones observed a large number of blister packs in a burn pile and knew pseudoephedrine products were often packaged in blister packs. He observed a garden sprayer "misting" and recognized it as a homemade hydrochloric acid generator and knew that hydrochloric acid is used in the manufacture of methamphetamine. The defendant's wife told the deputies the defendant was manufacturing methamphetamines [sic] in the garage. Deputy Jones

subjectively believed that there was a “meth operation” on the premises prior to any entry into the garage, based on the facts observed by him and his prior training and experience.

CP 359.

Deputy Jones testified that he was a member of the methamphetamine lab team for over a year, had been through the state certified course on labs, had personal experience in responding to over a hundred different labs and numerous dump sites. 7RP 85. He testified that the smell of anhydrous ammonia is one that he associates with methamphetamine labs. 7RP 92, 126. He also described how he first smelled an “extremely powerful” ammonia smell while on duty on November 20, 2002. 7RP 85-88, 113-115. In trying to discern the source of the smell he ended up on Mr. Neff’s property. 7RP 87-88. Deputy Jones testified that while looking around the property for the source of the smell, he encountered Mr. Neff who told him that the previous residents had a methamphetamine lab on the property. 7RP 93-94. The court’s findings regarding the blister packs in the burn pile and the misting hydrochloric acid generator were also supported by Deputy Jones’ testimony. 7RP 98-101. Deputy Jones testified that once he found these items, he believed that there was an active methamphetamine lab on the property. 7RP 100, 124. He came to this conclusion before the garage had been entered. 7RP 124. Detective Crawford testified that he spoke

with defendant's wife and that, after a while she agreed to give a taped statement. 7RP 42-44. The transcript of the interview was admitted into evidence and attached to the findings of fact. 7RP 44-45, CP 329-340. Defendant's wife told the detective that her husband was manufacturing methamphetamine in the garage. *See*, CP 332-335.

As shown above, each portion of the finding was supported by substantial evidence it should be considered a verity on appeal.

Defendant contends that the information from the defendant's wife should not have been considered by the court in determining whether the deputies would have gotten the warrant because "it is patently obvious that Mrs. Neff would not have made the admissions had the police not conducted the illegal search." Appellant's Supplemental brief at p.21. This statement is sheer speculation.

Defendant did not call his wife to testify at the suppression hearing. 7RP 143-144. There is no direct evidence of what was in Mrs. Neff's mind or what was known to her at the time she made those statements. The prosecutor called attention to this lack of testimony when the court was considering whether it should consider Mrs. Neff's statements in upholding the warrant or excise them as illegally obtained information. 7RP 162-164. The court did not excise Mrs. Neff's statements from the affidavit, so it must have concluded that they were not the result of an illegal search.

The State disputes that the record shows, at the point she gave her statement, that Mrs. Neff was aware that the deputies had gone into the garage. Detective Crawford did not testify that he informed Mrs. Neff that the deputies had entered the garage or that he provided her with any information about what had been found in the garage. 7RP 43-47, 64-66. There is nothing in the content of the taped statement that indicates that Mrs. Neff was aware of this information. CP 330-340. What is clear from the record is that prior to making the statement, Mrs. Neff knew that she was not free to leave until the deputies had located the source of the ammonia smell, and that CPS had been called to the scene. 7RP 65. Detective Crawford described her demeanor as being concerned about what was going to happen to her children. 7RP 65. In her taped statement, Mrs. Neff stated that she had told her husband that she did not like him manufacturing methamphetamine, but that he had ignored her. CP 335. She went on to state that her unhappiness with him had led to conflict and violence. CP 335. She stated that she had tried to get support from his parents and that "I felt like I was at my wit's end and anything [sic] other than calling the police." *Id.* Defendant speculates as to his wife's motivation for making her statement. From this record it can be argued that Mrs. Neff made her statements to the detective because she thought that discovery of her husband's lab was imminent and she wanted

to distance herself from his activities. Mrs. Neff might have thought that her statement might work to her advantage in keeping custody of her children.

Defendant has failed to show that there is any legal basis for excluding Mrs. Neff's statements to the detective from the court's consideration when assessing whether the deputies would have sought a warrant absent the illegal entry into the garage. As argued above, the finding was supported by substantial evidence in the record; it is a verity.

2. THE SUPPLEMENTAL FINDINGS ENTERED BY THE TRIAL COURT SHOW THAT THE TRIAL COURT PROPERLY UPHELD THE SEARCH WARRANT UNDER THE INDEPENDENT SOURCE DOCTRINE.

This court temporarily remanded this case to the trial court for entry of supplemental findings on two aspects based upon the existing record: 1) whether Deputy Fry subjectively believed there was an emergency; and 2) whether officers would have obtained a search warrant for defendant's property without the evidence from the initial search of the garage. The court entered a finding as to each question. CP 358-359.

As to the first issue, the court found that it could not make a determination about the subjective belief of a person who did not testify at

the suppression hearing. The State must accept this finding and concede its argument regarding the emergency exception to the warrant requirement.

On the second issue, the court entered a finding supporting the application of the independent source doctrine. CP 359. As argued above, this finding was supported by substantial evidence and should be treated as a verity. In his supplemental brief, defendant seems to acknowledge that the finding is supported by evidence; consequently, he argues that the trial court's "focus" was wrong by not giving any weight to facts that he considers relevant to his position. Appellant's supplemental brief at pp. 15-22. Such an argument essentially asks this court to ignore the factual finding of the trial court and make its own finding based upon the written record. This is not the function of an appellate court.

At the remand hearing, the trial court indicated that it had read the transcript of Detective Crawford's and Deputy Jones's testimony, made some notes, and drafted some tentative findings. RRP 3. The court did not consider the factual determination of whether the deputies would have obtained a search warrant without the illegal entry into the garage to be a difficult question, stating "Of course they would have and should have." RRP 10. Defendant fails to articulate how rereading all of the relevant testimony results in the trial court failing to consider relevant facts or having the wrong focus. The trial court considered the relevant testimony

of the suppression hearing and articulated which facts were compelling in reaching its factual determination. This is the function of a trial court.

In his supplemental brief, defendant argues that the court should have focused on the fact that the deputies were there for over an hour and a half before getting a warrant. Appellant's supplemental brief at p.17. This fact was called to the attention of the trial court upon remand. RRP 11. The court responded by noting that the officers smelled an extremely powerful scent of ammonia and could not locate the source, but that they could determine the garage was a "logically deductible source." RRP 11. The court noted that this would give them more reason or incentive to get a warrant to search the garage. RRP 11-12. Thus, it is clear that the court did consider the length of time the deputies were on the property but did not find that fact persuasive to its decision.

At the trial court, defense argued that if the deputies thought they had sufficient probable cause to get a warrant that there was no need for them to enter the garage without one. RRP 12. The court responded that the deputies thought that there was an emergency – a risk to human life – which explains their actions. RRP 12-13. The court explained that the fact that it disagreed with the deputies about their legal justification to enter without a warrant did not alter the fact that the deputies were motivated by good intentions. RRP 12-14. The record from the remand hearing does not provide any evidence to support defendant's claim that the court had an improper "focus" in assessing the facts.

Finally, the State disputes defendant's contention that the record of the suppression hearing shows that there was no effort to begin the process of getting a warrant prior to the illegal search as claimed by defendant. Appellant's Supplemental brief at pp. 17-18. The record does not indicate when Deputy Fry contacted Detective Crawford about preparing a warrant. Detective Crawford did not recall what time he was called by Deputy Fry. 7RP 48. Deputy Jones could not testify as to when Detective Crawford was contacted as that was done by Deputy Fry. 7RP 117. From the record, Deputy Fry could have made the call to Detective Crawford: 1) before Fry arrived at defendant's property; 2) after he arrived but before he entered the garage; or, 3) after he entered the garage. All that is clear from the record is that the entry into the garage had occurred prior to Detective Crawford's arrival at the Neff property. 7RP 61.

The trial court complied with this court's order and entered supplemental findings on two issues relevant to whether the search or search warrant could be upheld. Those findings indicate that the search of the garage cannot be upheld under the exigent circumstances exception, but that the search warrant can be upheld under the independent source doctrine. This was the ruling of the trial court after the initial suppression hearing.

D. CONCLUSION.

This court should affirm the trial court's denial of the motion to suppress as the trial court correctly found that the search could be upheld under the independent source doctrine.

DATED: February 17, 2006.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/17/06 [Signature]
Date Signature

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